No. 15862.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BYRON BORGEN,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Case.

Appellee must respectfully disagree with appellant's statement of facts in the following particulars:

First, appellant did not establish the method of preparation of the surface of the forecastle head of the DAVID E. DAY as he states in his brief (Br. p. 3). The appellant described the surface as painted with DeVoe deck red *enamel.* However, at the trial, Exhibit 4, "a piece of plate, which has been cleaned, wire-brushed, and given two coats of red lead and one coat of DeVoe and Raynolds deck red marine *lead*" [Tr. 58], was identified by appellant as truly representing the condition of the deck of the DAVID E. DAY [Tr. 169]. The only other witness as to

the composition of the deck surface, Mr. Swegarden, stated he did not recall the name of the paint employed but "believed" it was DeVoe deck red *enamel* [Tr. 12].

Second, appellant states that the customary practice in the maritime industry at the time of this accident with respect to the preparation of the forecastle heads of T-2 type tankers was to sprinkle sand on the surface coat of ordinary deck paint before it dried; or, alternatively, to paint the deck with commercial non-skid paint which contained an abrasive substance (Br. p. 5). However, appellant's witness, Captain Ernest F. Hanson, named only two non-naval, T-2 vessels, the D. J. MORAN [Tr. 71] and the W. M. IRISH [Tr. 70] on which he had sailed as master or mate on which the sand technique was used. Further, Captain Hanson stated that, on the D. J. MORAN, a tar product, "Bitumastic", was used on the main deck and that this substance was very slippery when wet and cold [Tr. 71]. He had never been on a vessel on which any commercial non-skid paint had been used [Tr. 74]. He stated that on Keystone Tankship Company's BUNKER HILL no sand or non-skid paint was used [Tr. 72]. He had no familiarity with the Union Oil Company practice [72]. Another commercial operator, Tidewater Associated, he stated, used "Bitumastic" on the main deck; a substance which admittedly became slippery when wet and cold [Tr. 73]. He had no knowledge as to what was used on their forecastle heads.

Witness Frank A. Amacisca, named only two non-naval vessels on which sand was used, the CELILO and TONTO

[Tr. 105]. On the former the mate whom he relieved had not used sand on the forecastle [Tr. 102]. Apparently, his only experience with commercial non-skid paint was upon the naval vessel MILACONA [Tr. 105].

The third witness, Edward Lee Wheeler, named only three commercial T-2 tankers on which he had served as a licensed officer on which sand was used on the final coat on the forecastle head, the CHERRY VALLEY [Tr. 135], the FORT CHARLOTTE [Tr. 141] and the SHAWNEE TRAIL [Tr. 155]. His only experience with non-skid paint was aboard the SHAWNEE TRAIL when five gallons or so had been sent down to the vessel for experimental use [Tr. 146].

It is submitted that this evidence was insufficient to establish the custom or usage in the maritime industry.

In addition, appellant has set forth no facts to establish any causal connection between the manner of preparing or maintaining the forecastle deck of the DAVID E. DAY and his fall of November 11, 1955.

ARGUMENT OF THE CASE.

THE COURT BELOW DID NOT ERR IN GRANTING THE APPELLEE'S MOTION FOR DISMISSAL OF THE APPELLANT'S ACTION.

I.

The Court Below Possessed the Power to Dismiss a Cause of Action Under the Jones Act and a Cause of Action Based on Unseaworthiness if the Appellant Had Shown No Right to Relief Upon the Facts and the Law.

Pursuant to Rule 41(b), Federal Rules of Civil Procedure, a court may dismiss an action after the plaintiff has completed the presentation of his evidence on the ground that upon the facts and the law plaintiff has shown no right to relief.

This power of the court extends to action under the Jones Act and to actions based on unseaworthiness. (See *Freitas v. Pacific Atlantic Steamship Company,* 218 F. 2d 562 (9th Cir., 1955); *Lake v. Standard Fruit and Steamship Company,* 185 F. 2d 354 (2d Cir., 1950); *Berk v. Mathiason Shipping Co.,* 45 Fed. Supp. 851 (S. D. N. Y., 1942).)

II.

The Appellant Showed No Right to Relief Under the Jones Act or on a Theory of Unseaworthiness.

A. In Order for the Appellant to Show a Right to Relief Under the Jones Act He Must Have Shown That the Appellee Was Negligent and That Such Negligence Was a Proximate Cause of His Injury.

The doctrine has often been reiterated by the courts that the basis of recovery under the Jones Act is negligence of the shipowner which is a proximate cause of the injury to the seaman.

This doctrine was clearly set out in *Buford v. Cleveland & Buffalo Steamship Company,* 192 F. 2d 196 (7th Cir., 1951), where the court stated, at page 198:

> "However, it is also fundamental that, under the Jones Act, damages may only be recovered for negligence (cases cited), and that a causal relationship must exist between the negligence and the injury. The burden of proof was upon the libellant here to establish by evidence that the respondent was guilty of negligence proximately causing the injury complained of."

See, *DeZon v. American President Lines,* 318 U. S. 660 (1943); *Schulz v. Pennsylvania Railway Company,* 350 U. S. 523 (1956); *Jackson v. Pittsburgh S.S. Co.,* 131 F. 2d 668 (6th Cir., 1942); *Lake v. Standard Fruit and Steamship Company, supra; Williams v. Tidewater Associated Oil Company,* 227 F. 2d 791 (9th Cir., 1955); *Harris v. Whiteman,* 243 F. 2d 563 (5th Cir., 1957).

In the *DeZon* case, the Supreme Court, in affirming a verdict directed against a seaman in a case under the Jones Act, held that there was insufficient evidence of negligence to give to the jury, and said, at page 660,

"damages may be recovered under the Jones Act *only for negligence.*" (Emphasis added.)

The *Lake* case involved an appeal by a seaman from an order dismissing his action under the Jones Act after the evidence was in. In affirming the dismissal the United States Court of Appeals stated, at page 356:

> "It is, of course, settled that damages may be recovered under the Jones Act only for negligence,"

and, at page 357:

> "We recognize that juries are given and should be given a wide scope in determining all questions of fact. But when it appears, as here, that involved are only 'the obvious and well-known risks of the business' then there is an absence of negligence in law and that case will not be left to the jury."

In the *Harris* case, 243 F. 2d at 565, the court stated:

> "We think it important again to point out that recovery under the Jones Act is dependent upon proof of negligence having a causal effect on the injuries suffered by a seaman."

B. In Order for the Appellant to Have Shown a Right to Relief for Unseaworthiness He Must Have Shown That an Unseaworthy Condition Existed and That Such Condition Was a Proximate Cause of His Injury.

The burden is on the plaintiff to show the existence of an unseaworthy condition. (See, *Grillo v. United States,* 177 F. 2d 904 (2d Cir., 1949); *Huber v. American President Lines,* 240 F. 2d 778 (2d Cir., 1957); *Olson v. The Patricia Ann,* 152 Fed. Supp. 315 (E. D. N. Y., 1957).)

That this doctrine applies in this Circuit was made clear by *Freitas v. Pacific Atlantic Steamship Company,*

supra, in which decision this court affirmed an order of the court below granting the defendant's motion to dismiss the plaintiff's action on the grounds that he failed to show the existence of an unseaworthy condition.

It is likewise incumbent upon the plaintiff to show a causal connection between the unseaworthy condition and his injury. Thus the court in *Mahnich v. Southern Steamship Company,* 321 U. S. 96, 99 (1943), stated:

> "The vessel and the owner are liable to indemnify a seaman for injury *caused* by unseaworthiness." (Emphasis added.)

In *Crawford v. Pope & Talbot Inc.,* 206 F. 2d 784, 789 (3rd Cir., 1953), the court stated:

> "Ever since the Osceola, 1903, 189 U. S. 158, 23 S. Ct. 483, 487, 47 L. Ed. 760, it has been the law that the vessel and her owner are * * * liable to an indemnity for injuries received by seamen *in consequence of* the unseaworthiness of the ship * * *" (Emphasis added.)

See: *Balada v. Lykes Brothers Steamship Co.,* 179 F. 2d 943 (2d Cir., 1950); *Grillea v. United States,* 229 F. 2d 687 (2d Cir., 1956); *Peterson v. United States,* 224 F. 2d 748 (9th Cir., 1955); *Quintin v. Sprague Steamship Co.,* 149 Fed. Supp. 226 (S. D. N. Y., 1957); *Alson v. United States,* 150 Fed. Supp. 308 (S. D. N. Y., 1957).

C. The Appellant Failed to Produce Evidence Upon Which a Jury Could Properly Proceed to Find That the Appellee Was Negligent.

To recover for negligence appellant was required to establish by competent evidence that the appellee breached a duty of care owed to the appellant, and that such

breach was a proximate cause of the appellant's fall. The breach of duty could have been shown either by showing that it was reasonably foreseeable to the appellee that injury would occur to the appellant if the appellee proceeded to maintain the deck on the forecastle of the DAVID E. DAY as it was doing, or by showing that a standard of care had been established in the industry, and that appellee failed to meet this standard.

Appellant made no attempt to prove that appellee could reasonably foresee the possibility of harm to the appellant if it continued to maintain the deck on the forecastle of the DAVID E. DAY as it did. However, an attempt was made by appellant to establish a custom or usage in the maritime industry which was contrary to the appellee's practice. It was claimed that the maritime industry in November of 1955 had adopted the practice with respect to T-2 type tankers of using "non-skid" paint or scattering sand in the surface coat of ordinary paint before it dried. With respect to the employment of "non-skid" paint, two of appellant's experts had no experience with such paint, Hanson [Tr. 74] and Amacisca [Tr. 90]. The third expert, Wheeler, had had experience with only five gallons or so of a non-skid paint which had been sent him for experimental purposes [Tr. 146]. All three of the gentlemen testified that they used sand on the surface coat of ordinary paint on the forecastle heads of T-2 tankers. However, their testimony fell far short of showing an industry practice with respect to commercially operated T-2 tankers by which a standard of care could be found to have been established. Witness Hanson named only two non-naval vessels, Mr. Amacisca two, and Mr. Wheeler three which used the sand method of deck preparation.

> "The burden was on plaintiff to establish the negligence and injury alleged; and, if the evidence failed adequately to support either element, defendant's motion should have been granted." (*Gunning v. Cooley,* 281 U. S. 90, 94 (1930).)

It is submitted that the appellant failed to present evidence sufficient to support his burden of proving negligence on the part of the appellee. In *Butte Copper & Zinc Co. v. Amerman,* 157 F. 2d 457 (9th Cir., 1946), this court held it error to direct a verdict against a party if there was *substantial* evidence in his favor. At page 458, this court stated:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

D. The Appellant Failed to Produce Evidence Upon Which a Jury Could Properly Proceed to Find an Unseaworthy Condition Existed.

In describing the duty of a shipowner to furnish a seaworthy vessel, the Court in *Doucette v. Vincent,* 194 F. 2d 834, 837-838 (1st Cir., 1952), said:

> "Nor is perfection required of shipowners by the maritime law of unseaworthiness, for generally stated it is the shipowner's duty under that law to provide a vessel sufficient, that is reasonably adequate, in materials, construction, equipment, stores, officers, men and outfit for the trade or service in which the vessel is employed."

In that case, a seaman was injured when a snatchblock opened causing him to become entangled in a loop of line. The plaintiff in that case, like the appellant here, attempted to prove the existence of an unseaworthy condition by

offering evidence of a better, safer device. The Court stated at page 838 of its opinion:

> "But if the vessel and equipment, including the snatchblock here supplied were reasonably safe and suitable, the shipowner's obligation was performed, even though there may have been some other type of snatchblock more modern or more perfect in some detail."

So here, if the vessel and equipment including the deck on the forecastle of the DAVID E. DAY were reasonably safe and suitable, the shipowner's obligation was performed, even though there may have been some other method of maintaining the deck more modern or more perfect in some detail.

The instant case is even more extreme, for no evidence was offered to show that the deck of the DAVID D. DAY, as maintained, was not reasonably safe. There was no evidence that the use of sand or of non-skid paint, as suggested by plaintiff, would have rendered the deck any more safe.

The Court here is asked to infer, from testimony that some ships use sand in their paint, and that a "non-skid" paint is manufactured, that the use of sand or such paint is safer than the method used aboard the DAVID E. DAY. Having made this inference, it is to be used as a basis for a further inference, already discredited by the cases, that the appellee failed to provide a seaworthy vessel by failing to use sand or "non-skid" paint.

No evidence was offered to show that the DAVID E. DAY was not reasonably adequate for the trade or service in which it was employed. No evidence was offered

to show that the DAVID E. DAY was not reasonably safe. No evidence was offered upon which it could properly be inferred that the DAVID E. DAY was not reasonably adequate or safe.

In the absence of evidence to support the appellant's allegation of unseaworthiness the Court below was correct in dismissing the action and should not be overruled here. (See *Bertha Building Corporation v. National Theatres Corporation,* 248 F. 2d 833 (2d Cir., 1957); *Franks v. Groendyke Transport,* 229 F. 2d 731 (10th Cir., 1956); *Simpson v. Continental Grain Company,* 199 F. 2d 284 (8th Cir., 1952).)

E. The Appellant Failed to Produce Evidence Upon Which a Jury Could Properly Proceed to Find That His Fall Was the Proximate Result of Either Negligence on the Part of the Appellee or the Existence of an Unseaworthy Condition.

In addition, appellant failed to produce substantial evidence that the alleged failure of the appellee to use sand or non-skid paint on the deck of the DAVID E. DAY was was the cause in fact or a proximate cause of the appellant's fall.

Appellant failed to produce evidence sufficient to give to the jury that, had the appellee used sand or non-skid paint, the subject accident would not have occurred.

> "It is not sufficient to show a set of circumstances bringing the theory of appellants within the realm of possibilities, nor can the theory itself furnish the deficiency; the evidence must bring the theory to the level and dignity of a probable cause." (*Ralston Purina Company v. Edmunds,* 241 F. 2d 164, 168 (4th Cir., 1957).)

Apellant's evidence established only that the paint used on the DAVID E. DAY was regular deck enamel [Tr. 169], which resulted in a smooth and semi-gloss surface [Tr. 13]. There was no evidence showing that this finish actually had any lower a coefficient of friction under the weather conditions prevailing at the time of the accident than did the so-called "non-skid" paint or ordinary paint sprinkled with sand which appellant claims should have been used.

> "In determining whether there is sufficient evidence to take the case to the jury, a federal judge performs a judicial function and is not a mere automaton. He must determine, 'not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it.' The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict." (*Reuter v. Eastern Airlines,* 226 F. 2d 443 (5th Cir. 1955).)

Respectfully submitted,

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